In The

Supreme Court of the United States

October Term, 1977

No. 77-1276

HON. LEO OXBERGER,
Petitioner,

vs.

JOHN R. WINEGARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

ROBERT G. RILEY, Esquire
GLENN L. SMITH, Esquire
DUNCAN, JONES, RILEY & FINLEY
404 Equitable Building
Des Moines, Iowa 50309

and

GARY G. GERLACH, Esquire
General Counsel
PAUL E. KRITZER, Esquire
Associate General Counsel
Des Moines Register and Tribune Company
715 Locust Street
Des Moines, Iowa 50304
Attorneys for Petitioner

COCKLE PRINTING CO., 1822 St. Mary's Ave., Omaha

TABLE OF CONTENTS

CASES CITED

CASES CITED—Continued

CASES CITED—Continued

CONSTITUTIONAL PROVISIONS CITED

In The

Supreme Court of the United States

October Term, 1977

No. .....

HON. LEO OXBERGER,
Petitioner,

vs.

JOHN R. WINEGARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Iowa issued on October 19, 1977.

OPINIONS BELOW

The opinion of the Supreme Court of Iowa is reported at 258 N. W. 2d 847 (Iowa 1977) and is set forth in Appendix A. The order denying the petitioner's petition for rehearing is unreported and is set forth in Appendix B.

JURISDICTION

The judgment of the Supreme Court of Iowa was made and entered on October 19, 1977. The petition for

rehearing, filed by the Des Moines Register and Tribune Company and Diane Graham on behalf of the Hon. Leo Oxberger, was denied on December 19, 1977. The jurisdiction of this court is invoked under 28 U. S. C. § 1257 (3).

———o———

QUESTIONS PRESENTED

1. Whether a state court in a civil action can ever override an acknowledged constitutional right protected by the First Amendment and order the disclosure of confidential information held by a news reporter simply by relying upon a common law statement that "the public has a right to every person's evidence"?

2. Whether a state court in a civil action can grant a motion to compel discovery of information held by a news reporter where there has been no showing that alternative methods of discovery have been exhausted?

———o———

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment I

"Congress shall make no law . . . abridging the freedom of speech, or of the press; . . . "

Amendment XIV

" . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . . "

STATEMENT OF THE CASE

The Des Moines Register and Tribune Company (hereafter Company) and Diane Graham, a journalist and news reporter for the Company, on behalf of the petitioner herein, the Hon. Leo Oxberger, then a state judge of Iowa's Fifth Judicial District, seek review of a decision of the Iowa Supreme Court which, in effect, allows the subpoena and deposition of a non-party news reporter in civil litigation without any showing that the need for discovery overrides the protections of the First Amendment and without the need for exhausting other avenues of discovery.

The matter now before this Court is an outgrowth of a tangle of litigation that began more than three years ago, when Sally Ann Winegard, claiming to be the common law wife of the Respondent, John R. Winegard, brought an action for Dissolution of Marriage in a Burlington, Iowa, state court. In October, 1974, the state district court held that a common law marriage did exist, and Winegard appealed that decision to the Iowa Supreme Court. In doing so, Winegard made no attempt to have the record of the case sealed to protect his privacy. The Iowa Supreme Court dismissed Winegard's appeal as inappropriate.

Following the adverse determination by the Iowa Supreme Court, Winegard filed another suit in U. S. District Court for the Southern District of Iowa, again disclosing the existing common law marriage, seeking to have certain of the Iowa Rules of Civil Procedure declared unconstitutional. This action was brought to prevent Sally

Ann Winegard from discovering financial information concerning Winegard, a wealthy Iowa business entrepreneur, during the dissolution of marriage proceedings. That suit quickly was dismissed by the U. S. District Court as "frivolous." *Winegard v. Anderkin,* Case No. 74-333-1 (S. D. Ia., April 3, 1975).

As a result of Winegard's federal law suit, Diane Graham, a news reporter for the Company, became aware of the unique questions surrounding the Winegard dissolution of marriage. In January, 1975, Miss Graham began to prepare a news article concerning the Winegard matters, and in doing so she examined legal documents on file as part of the public court record and also followed customary journalistic practice by seeking to verify facts through other available sources.

Miss Graham wrote a news article on the case which was published in the January 8, 1975, issue of the evening Des Moines Tribune and which was republished in substantially the same form in the following morning's editions of the Des Moines Register. One of the persons quoted in the news article was Stephen Schalk, an attorney for Sally Ann Winegard.

Two days after the news articles appeared, on January 10, 1975, Winegard filed a civil action in Scott County District Court in Davenport, Iowa, against Larsen, Schalk and Bradfield, the law firm representing Sally Ann Winegard. The civil action alleged that Winegard had been defamed and his privacy invaded as a result of the publi-

cation of the articles in the January 8 Tribune and January 9 Register.[1]

As the very first step in pursuing the cause of action against his wife's attorneys, Winegard issued subpoenas and notices of deposition to Miss Graham and the Company. On March 1, 1975, Miss Graham and the Company appeared for deposition in Des Moines, Iowa, authenticated the articles in question as substantially true and correct, and declined to answer over 100 other far-ranging questions concerning the substance of confidential conversations with news sources and editing procedures, on the grounds that these questions violated a qualified news gatherer's privilege and her rights under the First Amendment to the United States Constitution and Article I of the Iowa Constitution.

At no time during the course of his litigation against his wife's lawyers has Winegard attempted to depose any member of the defendant law firm.

Both Miss Graham and the Company applied to Polk County District Court in Des Moines for a protective order insulating them from Winegard's demands for confidential information and information about the editorial processes of the newspapers. John Winegard then filed a motion to compel discovery, again in Polk County District Court, a motion which was resisted by Miss Graham and the Company on the theory that such discovery would violate constitutional rights of the press.

---

1 The Scott County District Court subsequently granted a motion for summary judgment against Winegard on the claim of invasion of privacy, a decision upheld by the Iowa Supreme Court on December 21, 1977, *Winegard v. Larsen,* 260 N. W. 2d 816 (Iowa 1977).

On May 6, 1975, Polk County District Court Judge Leo Oxberger denied Winegard's motion to compel discovery, holding that the burden of proof rested with Winegard to show the need for such discovery. Judge Oxberger ruled that:

> "In light of the above discussion, a reporter or publisher under the First Amendment to the Constitution is not subject to court discovery procedures when such discovery is directed to ascertain the confidential sources of information, the substance of conversation with these sources, or the editing procedures which produce the articles unless the party seeking such establishes by clear and convincing proof that:
>
> 1. there exists a critical need for such information in order to maintain a cause of action [or] a defense to a cause of action.
> 2. this critical need be of such import to the cause of action or defense that it clearly overrides the strong protections afforded to the First Amendment.
> 3. all possible alternate sources of the information sought have been exhausted.
> 4. the information sought is relevant and material to the cause of action or defense involved."[2]

Winegard sought review of Judge Oxberger's decision by the Iowa Supreme Court, asking the court to find the Judge's action illegal. Winegard asserted that the First Amendment contains no qualified privilege which would protect confidential information held by news reporters. The Company and Miss Graham, appearing on behalf of

---

2 *Winegard v. Larsen,* Case No. CL8-4250, May 8, 1975, summarized in *Winegard v. Oxberger,* 260 N. W. 2d 816 (Iowa 1977).

Judge Oxberger (who was made the nominal defendant by Iowa's civil procedure rules), relied upon the weight of precedent supporting a qualified privilege for news reporters, and urged the court to adopt the four-part test used by Judge Oxberger to determine whether discovery of a news reporter's confidential information and journalistic work product is appropriate.

In its opinion, the Iowa Supreme Court acknowledged the existence of a qualified privilege for news reporters, but adopted a three-part test which severely limits the applicability of the privilege. The Iowa court held that discovery of a news reporter's confidential information and work product during the course of a civil action may be had if (1) the information is necessary or critical to the involved cause of action or defense pled; (2) that other reasonable means available by which to obtain the information sought have been exhausted; and (3) it does not appear from the record that the action or defense is patently frivolous. *Winegard v. Oxberger,* 258 N. W. 2d at 852 (Iowa 1977).

The court found that Winegard had met this three-part test, and held that Judge Oxberger's action was improper.

A petition for rehearing of the case was filed by Miss Graham and the Company on December 5, 1977, asserting that the Court erred in finding: (1) that a litigant using pretrial discovery is not required to show that the litigant's need for information clearly overrides the First Amendment's strong protections, and (2) that a simple request for admissions to an opposing party, which can be generally denied, will suffice as "exhaustion" of alter-

native methods of discovery, particularly where a litigant has made no attempt to depose an opposing party but instead selects a non-party news reporter as the only person to be deposed during the course of discovery. This petition for rehearing was denied by the Iowa Supreme Court on December 19, 1977.

(As a final footnote to the tangle of litigation fostered by Winegard, after three law suits, multiple appeals and years of litigation, Winegard finally lost his central point. In September, 1977, Winegard appealed yet again to the Iowa Supreme Court, after a state trial court had awarded temporary attorneys fees to his wife. In a lengthy opinion, the Iowa Supreme Court affirmed the trial court's finding that a common law marriage existed between Winegard and Sally Ann, and affirmed the award of attorney's fees to Mrs. Winegard. *In re the Marriage of Winegard,* 257 N. W. 2d 609 (Iowa 1977).)

ARGUMENT

I.

The Iowa Supreme Court erred in failing to hold that the First Amendment requires a clear and convincing showing that a litigant's need for a news reporter's information overrides the strong protections afforded by the First Amendment.

The decision of the Iowa Supreme Court purports to acknowledge a constitutionally based qualified privilege

for news reporters, stating that "where, as in the case before us, there is a significant encroachment upon some given constitutional right, it can be justified only upon a subordinating state interest which is compelling. *Bates v. City of Little Rock,* 361 U. S. 516 (1960); *NAACP v. Alabama,* 357 U. S. 449 (1958)." 258 N. W. 2d at 850. But in seeking a "compelling state interest" the Iowa Supreme Court found that state interest in the "long standing principle that the public has a right to every person's evidence." 258 N. W. 2d at 850. Such a vague standard leaves no room for the protection of delicate First Amendment rights. Absent a requirement that a litigant must make a clear and convincing demonstration of the critical need for a news reporter's confidential information, such a loose standard invites litigants to substitute the investigatory work of the news person for traditional discovery methods.

A court can never set aside the First Amendment unless there is a truly compelling interest to justify the infringement. The balance is always weighed in favor of the First Amendment protections unless the competing interest is so vital and so strong as to override basic constitutional protections. The U. S. Supreme Court traditionally has acted to protect First Amendment freedoms from vague standards which invite incursion into press freedoms without a showing of a specific, compelling, and overriding state interest. See, *DeGregory v. Attorney General of New Hampshire,* 383 U. S. 825 (1966); *NAACP v. Button,* 371 U. S. 415 (1963); *Bates v. Little Rock,* 361 U. S. 516 (1960); *NAACP v. Alabama,* 357 U. S. 449 (1958); *Thomas v. Collins,* 323 U. S. 516 (1945); *Schneider v. State,* 308 U. S. 147 (1939). Even the threat of assassi-

nation to a President of the United States has been held *not* to be compelling in this regard. *Bursey v. United States,* 466 F. 2d 1059 (9th Cir. 1972).

The Iowa Supreme Court found that the general duty of all persons to testify provided a "compelling interest," relying principally upon aging decisions in *United States v. Bryan,* 339 U. S. 323 (1950), and *Blackmer v. United States,* 284 U. S. 421 (1932). The Iowa Supreme Court's holding clearly fails to acknowledge the far-reaching development of the First Amendment since *New York Times v. Sullivan,* 376 U. S. 254 (1964), first brought the law of defamation within the requirements of the First Amendment. In a line of evolving cases, the U. S. Supreme Court has more recently enunciated and developed the principle that the editorial process of the press is entitled to special protections. See, e.g., *Miami Herald Publishing Co. v. Tornillo,* 418 U. S. 241 (1974); *Columbia Broadcasting System, Inc. v. Democratic National Committee,* 412 U. S. 94 (1974); *New York Times v. Sullivan,* 376 U. S. 254 (1964).

In *Branzburg v. Hayes,* 408 U. S. 665 (1972), this Court held that a news reporter cannot refuse to disclose confidential information when called before a grand jury *in a criminal case.* While that principle retains full vitality, many courts have been willing to establish a qualified privilege for news reporters in a civil setting, particularly in frivolous and marginal cases such as Winegard's case, where the news reporter is not a party to the litigation. See, *Herbert v. Lando,* — F. 2d — (2d Cir. 1977), 3 Med. L. Rptr. 1241; *Silkwood v. Kerr-McGee,* 563 F. 2d 433 (10th Cir. 1977); *Cervantes v. Time, Inc.,* 330 F. Supp. 936 (E. D. Mo. 1971), aff'd. 464 F. 2d 986 (8th Cir. 1972), *cert. den.* 409 U. S. 1125 (1973); *Richards of*

Rockford, Inc. v. Pacific Gas and Electric Co., 71 F. R. D. 388 (N. D. Cal. 1976); *Apicella v. McNeil Laboratories,* 66 F. R. D. 78 (E. D. N. Y. 1975). Many of these cases relied in part upon *Baker v. F&F Investment Co.,* 470 F. 2d 778 (2d Cir. 1972), and in *Richards, supra,* the court used the *Baker* analysis to develop a proper balancing test:

> " . . . the cases involving newsmen provide useful guidelines for striking a balance between discovery and non-disclosure: the nature of the proceeding, whether the deponent is a party, whether the information sought is available from other sources. . . . " 71 F. R. D. 388 at 390.

The vague and unworkable test enunciated by the Iowa Supreme Court fails to provide sufficient safeguards to insure that First Amendment freedoms will remain intact. The Iowa standard as interpreted by the Iowa Supreme Court would allow basic rights of the press to be trampled upon in any civil action as long as a news reporter's subpoena is preceded by any flimsy attempt to gather information from any other source, making the press a likely target for time-consuming and irrelevant fishing expeditions like the pointless fishing expedition the tangled Winegard litigation has thrust upon Miss Graham and the Company. This Court must strengthen and clarify the standard of the Iowa Supreme Court in order to protect First Amendment freedoms from infringement. As this Court noted in *Erznoznik v. City of Jacksonville,* 422 U. S. 205 (1975): "Where First Amendment freedoms are at stake, we have repeatedly emphasized that precision of drafting and clarity of purpose are essential."

II.

The Iowa Supreme Court erred in failing to hold that discovery of a non-party news reporter in a civil action is improper until all other reasonable and practicable means of obtaining the information have been exhausted.

The standard set forth by the Iowa Supreme Court includes the element "that other reasonable means available by which to obtain the information sought have been exhausted." 258 N. W. 2d 847 at 852. The Iowa Supreme Court went on to hold, however, that Winegard had "exhausted" such alternative means of discovery simply by serving a simple "Request for Admissions," which was subsequently denied by the defendant, Stephen Schalk. As a practical matter, a simple "Request for Admissions" under Iowa's procedural rules rarely yields much useful information, since the request can be easily evaded with simple "yes" or "no" answers. In holding that a simple "Request for Admissions" is sufficient, the Iowa Supreme Court's decision flies in the face of precedent and hence creates a conflict of laws question involving a fundamental constitutional right. In *Garland v. Torre,* 259 F. 2d 545 (2nd Cir. 1958), the Second Circuit held that "reasonable" discovery of alternative sources was, at a minimum, *full* oral depositions of other witnesses before an attempt to discover the news reporter was sanctioned. In the instant case, Winegard made no attempt to depose his opposing party, Stephen Schalk, or any of the members of his law firm. The clear weight of precedent would indicate that discovery of Miss Graham and the Company is not proper in such a case, particularly where Winegard has alleged no hardship or ex-

tenuating circumstances that would prevent him from carrying on a thorough, oral deposition of other available witnesses which was bound to yield the same information as that sought from the press.

At a minimum, a litigant must be required to depose his opposing party when it appears likely that such a deposition would eliminate the need for discovery infringing upon sensitive rights of the press. The Constitutional protections for news reporters must be guarded even more vigilantly when the news reporter is a mere stranger to the litigation. See, *Bursey v. United States,* 466 F. 2d 1059 (9th Cir. 1972); *Baker v. F&F Investment Co.,* 470 F. 2d 783 (2nd Cir. 1972); *Democratic National Committee v. McCord,* 356 F. Supp. 1394 (D. D. C. 1973); *Apicella v. McNeil Laboratories,* 66 F. R. D. 78 (E. D. N. Y. 1975); *Richards of Rockford v. Pacific Gas and Electric Co.,* 71 F. R. D. 388 (N. D. Cal. 1976).[3]

---

3 In the recently decided case of *Caldero v. Tribune Publishing Co.,* 98 Idaho 288, 562 P. 2d 791 (Idaho, 1977); cert. den., — U. S. —, 46 U. S. L. W. 3294 (Oct. 31, 1977), the Idaho Supreme Court found that disclosure of certain confidential information may be proper where the news reporter is the only source available and where the news reporter is a party to the litigation. This is not the case in the matter now before the Court. John Winegard's cause of action is against his wife's attorneys, not Miss Graham or the Company, yet Miss Graham was the first —and only—target of Winegard's subpoena.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully prays that this Court issue a writ of certiorari to review the judgment of the Iowa Supreme Court.

Respectfully submitted,

ROBERT G. RILEY, Esquire
GLENN L. SMITH, Esquire
DUNCAN, JONES, RILEY & FINLEY
404 Equitable Building
Des Moines, Iowa 50309
Telephone: 515-288-0145

and

GARY G. GERLACH, Esquire
General Counsel
PAUL E. KRITZER, Esquire
Associate General Counsel
Des Moines Register and Tribune Company
715 Locust Street
Des Moines, Iowa 50304
Telephone: 515-284-8112

Attorneys for Miss Graham and the Company

APPENDICES A AND B

APPENDIX A

IN THE SUPREME COURT OF IOWA

JOHN R. WINEGARD,

Petitioner,

vs.

HON. LEO OXBERGER, Judge of the 5th Judicial District of Iowa,

Respondent.

(Filed October 19, 1977)

Original certiorari to determine whether respondent judge exceeded his proper jurisdiction or otherwise acted illegally in overruling petitioner's motions to compel discovery of a newsperson, and to sequester a predecree order filed in a pending marriage dissolution action.—Writ sustained.

RAWLINGS, J.

This is an original certiorari proceeding to determine whether respondent judge exceeded his proper jurisdiction or otherwise acted illegally in overruling petitioner's motions to compel discovery of a newsperson, and to sequester a predecree order filed in a pending marriage dissolution action. We sustain the writ.

February 6, 1973, Sally Ann Winegard (Sally) commenced proceedings in Des Moines District Court (District Court) for dissolution of a common-law marriage she claims existed between her and John R. Winegard. (Winegard) October 18, 1974, District Court, upon findings

of fact and conclusions of law, held a valid marriage existed as between these two persons.

Winegard then unsuccessfully applied to this court for permission to effect an interlocutory appeal. Attached to the application was a copy of the District Court adjudication.

Subsequently, Sally attempted to discover financial information from Winegard. He, in turn, sought declaratory and injunctive relief from such discovery in federal district court. A copy of the interrogatories submitted by Sally to Winegard was there made a part of the latter's pleadings. April 3, 1975, this action was dismissed on jurisdictional grounds.

Meanwhile, Diane Graham (Graham), a Des Moines Register and Tribune Company (Register) reporter assigned to examine the records in Des Moines courts, became conversant with the documents filed in connection with Winegard's federal action. She prepared two articles later published by the Register. They stated in some detail the facts underlying Sally's claim that a common-law marriage existed. Many of the statements therein contained were attributed to Stephen L. Schalk (Schalk), Sally's attorney in the marriage dissolution proceeding. Thereupon Winegard brought an action for damages in Scott District Court against the Schalk law firm members by reason of asserted invasion of privacy and defamation. The present proceeding is an outgrowth of that action.

March 1, 1975, as an action-related "discovery" approach, Winegard sought to depose Graham and obtain from her or the Register any information obtained and

notes made in preparation of the articles. Graham appeared pursuant to subpoena and testified she "substantially wrote" the articles which, to the best of her knowledge, were true and correct. She refused, however, on the basis of rights allegedly guaranteed by the First Amendment to the United States Constitution and article I, section 7, of the Iowa Constitution, to answer questions about conversations with or identity of her sources, preparation of the articles, and procedures followed in editing them.

Graham and the Register then applied to Polk District Court, pursuant to Iowa R. Civ. P. 123, for a protective order quashing the deposition-related subpoenas. Winegard moved to compel discovery under rule 134. April 1, 1975, hearing was had before Judge Leo Oxberger (respondent) on those motions. April 8, 1975, Winegard filed a written renewal of a motion to sequester (made orally at the hearing) and a motion to strike the copy of Winegard's interlocutory appeal application (with District Court's ruling attached), which was Exhibit C of the application for protective order. Graham and the Register resisted.

Judge Oxberger overruled Winegard's motion to compel discovery. He concluded the First Amendment granted Graham a newsperson qualified privilege not to answer Winegard's questions, and in so doing fashioned a four-step test which Winegard was held not to have fulfilled. Respondent judge also denied motions to sequester and strike District Court's ruling, holding the language of Section 598.26, The Code 1973, did not apply to judicial findings of fact and conclusions of law.

June 12, 1975, this court granted certiorari and pursuant to Winegard's motion ordered sealed and sequestered "those papers constituting transcripts of testimony, documents, or proceedings or which copy any part thereof, in the dissolution action" pending this opinion. Included in the sequestration order was Exhibit C about which Winegard complained, together with Sally's interrogatories attached by Winegard to his federal court complaint, Exhibit B of Graham's application.

These are the broadly stated issues here to be resolved:

1. Does Code § 598.26 require that copies of judicial findings of fact and conclusions of law and interrogatories in a pending dissolution action be sealed or sequestered when filed in another court's public records?

2. Does the First Amendment, United States Constitution, or article I, section 7, Iowa Constitution, support recognition of a newsperson's privilege, and if so, has Winegard met his burden to override such privilege?

I. Our opinion in the case of In re Marriage of John Robert Winegard and Sally Ann Winegard, — N. W. 2d — (Iowa, September 1977), unavoidably portrays the entire factual situation which inheres in the first above stated question. Therefore it is now moot and the second issue alone will be entertained.

II. Our scope of review is amply developed in Hightower v. Peterson, 235 N. W. 2d 313, 316-317 (Iowa 1975), quoting State v. Cullison, 227 N. W. 2d 121, 126 (Iowa 1975), and need not be repeated.

III. To what extent, if any, does the First Amendment protect confidentiality of newsperson's sources and information? Although this is a question of first impression in Iowa, it has evoked a flood of litigation and commentary elsewhere. Unfortunately, controversy has only increased since Branzburg v. Hayes, 408 U. S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972).

Despite the fact *Branzburg* dealt with criminal proceedings and did not reach specifics of the subject now before us, the Court did say, 408 U. S. at 704, 92 S. Ct. at 2668:

> "Freedom of the press is a 'fundamental personal right' which 'is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.' "

Even more pointedly Schneider v. State of New Jersey, 308 U. S. 147, 160, 60 S. Ct. 146, 150, 84 L. Ed. 155 (1939), says: "The freedom of speech and of the press secured by the First Amendment, U. S. C. A. Const., against abridgment by the United States is similarly secured to all persons by the Fourteenth against abridgment by a state."

In the same case, 308 U. S. at 161, 60 S. Ct. at 150-151, this observation appears:

> *"This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties.* The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free

men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties. (emphasis supplied).

"In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights."

The foregoing effectively negates Winegard's claim to the effect there is no such thing as a constitutionally based newsperson's privilege.

Looking to the other side of the coin it will be recalled Graham and the Register do not assert a newsperson enjoys an absolute privilege from testifying in a civil proceeding. In essence they take the position Judge Oxberger was right in recognizing existence of a qualified privilege, subordinated if the questioner meets a four-factor test.

Winegard counters by positing that in event this court finds any or all of the four standards enunciated below are applicable they were met and respondent judge acted illegally in holding otherwise. For reasons later set forth we agree.

IV. Although this court is persuaded there exists a fundamental newsperson privilege we are equally satisfied it is not absolute or unlimited.

Admittedly the majority opinion in *Branzburg* fixed upon strong public interest in effective law enforcement but it also recognized "the longstanding principle that 'the public . . . has a right to every man's evidence', except for those persons protected by a constitutional, common-law, or statutory privilege, * * *." 408 U. S. at 688, 92 S. Ct. at 2660.

So, absent a local statute regarding a newsperson's privilege we look to constitutional or common-law precepts.

As above indicated, Winegard's right to Graham's testimony can be predicated in large part if not entirely upon the longstanding principle that the public has a right to every person's evidence.

Nevertheless, where as in the case before us, there is a significant encroachment upon some given constitutional right, it can be justified only upon a subordinating state interest which is compelling. Cf. Bates v. City of Little Rock, 361 U. S. 516, 524, 80 S. Ct. 412, 417, 4 L. Ed. 2d 480 (1960); NAACP v. Alabama, 357 U. S. 449, 462-463, 78 S. Ct. 1163, 1172, 2 L. Ed. 2d 1488 (1958).

However, we are persuaded such requirement is presently satisfied in light of this theorem set forth in United States v. Bryan, 339 U. S. 323, 331, 70 S. Ct. 724, 730, 94 L. Ed. 884 (1950):

"[P]ersons summoned as witnesses by competent authority have certain minimum duties and obligations which are necessary concessions to the public interest in the orderly operation of legislative and judicial machinery. A subpoena has never been treated as an invitation to a game of hare and hounds, in which the witness must testify only if cornered at

> the end of the chase. If that were the case, then, indeed, the great power of testimonial compulsion, so necessary to the effective functioning of courts and legislatures, would be a nullity. We have often iterated the importance of this public duty; which every person within the jurisdiction of the Government is bound to perform when properly summoned."

See also Blackmer v. United States, 284 U. S. 421, 438, 52 S. Ct. 252, 255, 76 L. Ed. 375 (1932).

And in Garland v. Torre, 259 F. 2d 545, 548-549 (2d Cir. 1958), cert. denied, 358 U. S. 910, 79 S. Ct. 237, 3 L. Ed. 2d 231, then Circuit Court Judge Potter Stewart teachably stated:

> "'[F]reedom of the press, precious and vital though it is to a free society, is not an absolute. What must be determined is whether the interest to be served by compelling the testimony of the witness in the present case justifies some impairment of this First Amendment freedom. That kind of determination often presents a 'delicate and difficult' task. Schneider v. State of New Jersey, 1939, 308 U. S. 147, 161, 60 S. Ct. 146, 161, 84 L. Ed. 155; American Communications Ass'n., C. I. O. v. Douds, supra, 339 U. S. at page 400, 70 S. Ct. at page 684 (and see cases cited in that opinion at pages 398 and 399, at pages 683 and 684 respectively). The task in the present case, though perhaps delicate, does not seem difficult.
>
> " 'Liberty, in each of its phases, has its history and connotation.' Near v. State of Minnesota, supra, 283 U. S. at page 708, 51 S. Ct. at page 628. Freedom of the press, hard-won over the centuries by men of courage, is basic to a free society. But basic too are courts of justice, armed with the power to discover truth. The concept that it is the duty of a witness to testify in a court of law has roots fully as deep in our history as does the guarantee of a free press.

> "It would be a needless exercise in pedantry to review here the historic development of that duty. Suffice it to state that at the foundation of the Republic the obligation of a witness to testify and the correlative right of a litigant to enlist judicial compulsion of testimony were recognized as incidents of the judicial power of the United States. Blair v. United States, 1919, 250 U. S. 273, 279-281, 39 S. Ct. 468, 63 L. Ed. 979; Wilson v. United States, 1911, 221 U. S. 361, 372-373, 31 S. Ct. 538, 55 L. Ed. 771; Blackmer v. United States, 1932, 284 U. S. 421, 438, 52 S. Ct. 252, 76 L. Ed. 375; United States v. Bryan, 1950, 339 U. S. 323, 331, 70 S. Ct. 724, 94 L. Ed. 884. Whether or not the freedom to invoke this judicial power be considered an element of fifth Amendment due process, its essentiality to the fabric of our society is beyond controversy. As Chief Justice Hughes put it: '[O]ne of the duties which the citizen owes to his government is to support the administration of justice by attending its courts and giving his testimony whenever he is properly summoned.' Blackmer v. United States, supra, 284 U. S. at page 438, 52 S. Ct. at page 255.
>
> "Without question, the exaction of this duty impinges sometimes, if not always, upon the First Amendment freedoms of the witness. Material sacrifice and the invasion of personal privacy are implicit in its performance. The freedom to choose whether to speak or be silent disappears. But '[t]he personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public.' Blair v. United States, supra, 250 U. S. at page 281, 39 S. Ct. at page 471.
>
> "If an additional First Amendment liberty—the freedom of the press—is here involved, we do not hesitate to conclude that it too must give place under the Constitution to a paramount public interest in the fair administration of justice."

Mindful of the foregoing this court now holds there exists, in the present case, an undiluted compelling state interest of such persuasive force as to subordinate a newsperson's privilege to withhold confidential information.

V. Next to be resolved is the appropriate criteria upon which the above holding shall be presently applied.

Our research reveals general usage of one or more of three qualifying standards which are, as commonly phrased:

(1) That the information is necessary or critical to the involved cause of action or defense pled. See, e. g., Garland v. Torre, 259 F. 2d 545; Carey v. Hume, 492 F. 2d 631 (D. C. 1974), cert. dismissed, 417 U. S. 938; Baker v. F & F Investment, 470 F. 2d 778 (2d Cir. 1972); Connecticut State Bd. of Labor Relations v. Fagin, 33 Conn. Supp. 204, 370 A. 2d 1095 (Super. Ct. 1976); Schwartz v. Time, Inc., 71 Misc. 2d 769, 337 N. Y. S. 2d 125 (1972); Brown v. Commonwealth, 214 Va. 755, 204 S. E. 2d 429 (1974), cert. denied, 419 U. S. 966, 95 S. Ct. 229, 42 L. Ed. 2d 182. As stated in *Garland,* 259 F. 2d at 550, often quoted as authority for this standard, the information sought should go to the heart of the questioner's claim. E. g., Apicella v. McNeil Labs, 66 F. R. D. 78, 81-82 (E. D. N. Y. 1975).

(2) That other reasonable means available by which to obtain the information sought have been exhausted. See, e. g., Bursey v. United States, 466 F. 2d 1059, 1083 (9th Cir., 1972); Garland v. Torre, 259 F. 2d at 551; Democratic National Committee v. McCord, 356 F. Supp. at 1396-1397. Cf. Shelton v. Tucker, 364 U. S. 479, 489-490, 81 S. Ct. 247, 252-253, 5 L. Ed. 2d 231 (1960).

(3) That it does not appear from the record the action or defense is patently frivolous. See, e. g., Carey v. Hume, Bursey v. United States, and Cervantes v. Time, Inc., all cited above; United States v. Liddy, 354 F. Supp. 208 (D. D. C. 1972).

These standards are hereby approved and adopted.

For purpose of clarity it is understood our holding today regarding a newsperson's privilege shall be deemed equally applicable to article I, section 7, of the Iowa Constitution. Cf. Chicago Title Ins. Co. v. Huff, 256 N. W. 2d 17, 23 (Iowa 1977), and citations.

VI. Now to be determined is the legality of the order entered below in light of our adopted three-prong standard.

At the outset we are satisfied Winegard's basic discovery objective is necessary and critical to his cause of action against Schalk, et al. More specifically Winegard needs to know what was said to Graham and by whom. It is not for us, however, to presently resolve the subject matter relevancy of any discovery-related questions which have been or may be put to Graham by Winegard. Rather a determination thereof must be left to trial court in the first instance, guided by this standard.

In light of the foregoing there is another facet of this appeal which must be put to rest. As heretofore stated, one of the elements Winegard was required to establish as a discovery prerequisite relates to a showing by the questioner that other reasonable avenues of information have been exhausted.

Noticeably, Winegard's invasion of privacy and defamation action is against Sally's attorneys, the Schalk law firm, not against the Register and Graham. Furthermore, Winegard's petition focuses upon two articles prepared by Graham and published by the Register, with defendant Schalk therein clearly identified as the informant.

The record also reveals, as aforesaid the hearing upon which Judge Oxberger acted was held April 1, 1975. It further appears that as an adjunct thereof Winegard filed his request for admissions, directed to Schalk, and the latter's responses. See Iowa R. Civ. P. 124 and 127. In brief, these documents were made a part of the record and available to respondent judge at all times material to the discovery-based proceeding below. No useful purpose will be served by here reciting the inquiries addressed to Mr. Schalk and his responses. In essence, this party admitted having conversed with Graham by phone about Winegard's federal court action, but denied having made statements attributed to him by Graham's articles. Under these circumstances we find Winegard did reasonably exercise and exhaust other plausible avenues of information.

Although other discovery *methods* may have been available to Winegard we do not, in this case, find any alternate approach would have been more fruitful. Neither is it for us to dictate counsel's discovery tactics. As best determinable Graham and Schalk were sole participants in the above noted telephone conversation. Thus, absent any illumination by defendant Schalk on the subject of that conversation, Graham is apparently the only remaining person who could conceivably provide the information

essential to Winegard's invasion of privacy and defamation action against Schalk and his associates.

Looking now to the third factor, this court cannot from this record say Winegard's action against Schalk and his co-defendants is facially frivolous or patently without merit.

Moreover, we find no cause to now hold Winegard is abusing "judicial process to force a wholesale disclosure of a newspaper's confidential sources of news * * *." Garland v. Torre, 259 F. 2d at 549. Neither does there appear any basis upon which to at this time hold Winegard embarked upon or has pursued a course designed to annoy, embarrass or oppress Graham. See *Garland*, 259 F. 2d at 551.

Judge Oxberger exceeded his jurisdiction or otherwise acted illegally in overruling Winegard's motion to compel discovery by deposition of Diane Graham.

VII. Because of existing peculiar circumstances set forth in Division I hereof, no useful purpose will be served by continuing in force and effect any sequestration order or orders heretofore entered by this court in connection with the instant appeal, therefore they are hereby set aside and annulled. This shall not, however, be deemed to create any precedent as to the scope and application of Code § 598.26.

WRIT SUSTAINED.

All Justices concur.

APPENDIX B

IN THE SUPREME COURT OF IOWA

No. 2-58361

JOHN R. WINEGARD,

Petitioner,

v.

HON. LEO OXBERGER, Judge, Fifth Judicial District of Iowa,

Respondent.

O R D E R

(Filed December 19, 1977)

The petition for rehearing, filed on behalf of Diane Graham and The Des Moines Register and Tribune Company in the above entitled matter, has been carefully considered by the entire membership of the court and is now refused and denied.

Done this 19th day of December, 1977.

/s/ C. Edwin Moore

Chief Justice—Iowa Supreme Court